LIM BEE CHENG

v.

CHRISTOPHER LEE JOO PENG

HIGH COURT MALAYA, PENANG
TUAN VINCENT NG KIM KHOAY J
[DIVORCE PETITION NO. 47-149-1988]
30 NOVEMBER 1995

FAMILY LAW: *Division of matrimonial assets - Section 76 Law Reform (Marriage and Divorce) Act 1976 - Whether property acquired during marriage by joint effort of parties - Whether division to be determined under s. 76(1) or s. 76(3) - Discretion of Court to apportion under s. 76(4) - Failure by petitioner to plead material facts - Whether fatal - Rules 8 & 56 Divorce and Matrimonial Proceedings Rules 1980 - Whether conduct of parties relevant to division of matrimonial assets - Whether property to be sold at current market price.*

The parties were married on 29 April 1975 and were judicially separated on 26 February 1979. The petitioner filed for divorce on the ground of adultery and was granted a decree absolute on 21 September 1990. In her divorce petition she had prayed *inter alia* for the transfer of the respondent's half share in the matrimonial home into her name under s. 76 of the Law Reform (Marriage and Divorce) Act 1976 (the Act). In reply, the respondent prayed that the said property be sold and proceeds be divided in the proportion of 70:30 in his favour.

The said property was purchased by the respondent in December 1973 for RM47,000 and on 3 February 1975, the petitioner's name was included as joint owner which, according to the petitioner, was the respondent's wedding gift to her. A loan of RM31,000 was obtained on security of a legal charge in favour of Peninsula Finance Berhad. It was not disputed that the respondent had paid the initial down payments, the monthly mortgage instalment payments totalling RM55, 603.86 and had expended a sum of RM20,458.98 on legal fees and improvements. It was also not disputed that the petitioner had since 1990 paid the quit rents and assessments and after the divorce had expended RM47,094.06 to redeem the said property following action by Peninsula to auction the said property. The petitioner claimed to have made certain instalment payments as evidenced by ten receipts but this was denied by the respondent. The facts showed that the petitioner was a teacher with a salary of RM1,660 and the respondent was a race horse commentator earning RM5,250 per month. The petitioner together with the child of the marriage had been in sole occupation of the said property since late 1977.

The main issue for the Court's consideration was whether the said property had been acquired by the joint effort of the parties during the marriage.

Held:

[1] After carefully considering the oral and documentary evidence the Court finds that the said property was acquired during the marriage by the sole effort of the respondent. Thus the issue of the division of assets would have to be determined within the purview of s. 76(3) and the exercise of the Court's powers thereunder as stipulated by s. 76(4) of the Act.

[2] As rr. 8 and 56 of the Divorce and Matrimonial Proceedings Rules 1980 (the Rules) and Forms 2 and 11 therein are quite sufficient to enable the petitioner to raise any issue relevant to the decision of matrimonial assets under s. 76, the petitioner's failure to plead in the petition a contention that the 1/2 share of the matrimonial home was intended as a wedding gift, would preclude her from raising this point at the trial. This approach is also based on the principle that the opposite party is entitled to know the precise nature of the pleaded case that he or she would have to meet.

[3] It is just and essential that the Court requires an applicant who comes before the Court to seek a division of matrimonial assets under s. 76 of the Act to submit for the Court's adjudication, the whole of the property or properties acquired during the marriage.

[4] Strictly in accordance with the requirements under s. 76(4) of the Act it follows that the respondent should receive a greater proportion of the share or proceeds of sale, and upon the facts of the current case the Court holds that the petitioner's share of the proceeds be limited to no more than one-third undivided share of the said property or of the proceeds of sale. But the Court may still, in the interest of justice, exercise its discretion within the framework of s. 76(3) and (4) to confirm the registered status quo in view of the respondent's concession to accept equality of division.

[5] The power of the Court to order division of matrimonial assets under s. 76 is subject and subject only to those considerations prescribed therein and conduct of the parties is and has always been irrelevant.

[6] Where the dispute between the husband and wife concerns a particular and singular property and the Court holds that both are entitled to a share of the same, the Court would have no alternative but to order the sale of the property to a third party or by one party to the other. In such an event, it can neither be sensible nor practical for the Court to order that the property be sold at a price other than the current market price.

[7] The said property is to be divided between the petitioner and the respondent equally and be sold within 3 months from the date hereof at the current market value, to be determined by a reputable licensed valuer appointed by the Senior Asistant Registrar. The parties are at liberty to buy the other out of the half share of the said property; provided that if same shall be sold to third parties, the petitioner and respondent shall each partake in 1/2 share of the proceeds of its sale after deduction of expenses. It is also ordered that the petitioner be compensated to the extent of half of RM47,094.06 expended by her on the redemption of the said property. Each party is to bear his or her own costs.

[Order accordingly]

Cases referred to:
Wee Ah Lian v. Teo Siak Weng [1992] 1 SLR 688 ***(foll)***
Hyman v. Hyman [1929] AC 601 ***(foll)***
Re Heng Peng Hoo [1989] 3 MLJ 103 ***(foll)***
Lee Yu Lan v. Lim Thain Chye [1984] 1 MLJ 56 ***(refd)***
Koh Kim Lan Angela v. Choong Kian Haw [1994] 1 SLR 22 ***(foll)***
Leake v. Bruzzi [1974] 1 WLR 1528 ***(refd)***
Cracknell v. Cracknell [1971] 356 ***(refd)***

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976, ss. 64(2), 76, (1), (2), (3), (4)
Divorce and Matrimonial Proceedings Rules 1980, rr. 8, 56

Other sources referred to:
Matrimonial Law in Singapore and Malaysia, Tan Cheng Han, Butterworths

For the petitioner - Tan Beng Hong (B.C. Lim with him); M/s. Tan Beng Hong & Co., Penang
For the respondent - J.A. Yeoh (Daphne Choy Gaik Choo with him); M/s. Shearn Delamore & Co., Penang

JUDGMENT

Vincent Ng Kim Khoay J:

In her divorce petition herein the petitioner had prayed for an order under s. 76 of the Law Reform (Marriage and Divorce) Act 1976 (the Act), that the respondent do transfer his half undivided share of the matrimonial home bearing address no. 41, Changkat Tembaga, Island Park, Penang (the said property) to her; the other half (1/2) undivided share of the title in the said property being already in her name.

The respondent has, in his answer, prayed that the said property be sold and the proceeds of the sale be divided in the proportion of 70% for himself and 30% for the petitioner.

The background of the case can be gleaned from the statement of agreed facts filed in Court. Briefly, the facts are as follows:

The petitioner and the respondent were married on 29 April 1975. Differences arose in the marriage and the parties were legally separated under an order for judicial separation dated 26 February 1979, on the grounds of the respondent's adultery. A divorce *decree nisi* was later granted by the High Court on 21 June 1990 under this petition and was made final and absolute on 21 September 1990.

The said property was purchased by the respondent in December 1973 for a total purchase price of RM47,000. Subsequently on 3 February 1975, the respondent included the petitioner's name as co-owner jointly with him. The respondent then arranged for a loan of RM31,000 on the security of a legal charge over the said property in favour of Peninsula Finance Berhad and made the monthly repayments (mortgage instalments) towards its redemption. There was no serious challenge to the respondent's contention that he had, in addition to the initial down payments and the monthly mortgage instalment payments totalling RM55,603.86, expended a sum of RM20,458.98 on legal fees and assessments, fixtures and improvements and assorted movables. It is not disputed that the petitioner had since 1980 paid quit rents and assessments for the said property and had, in August 1990 - that is, after the said divorce *decree nisi* of 21 June 1990 - expended a sum of RM47,094.06 towards the redemption of the said property following action by Peninsula Mortgage Berhad to auction off the said property.

It is common ground that the petitioner is a teacher, drawing a monthly salary of RM1,660 while the respondent is a race horse commentator on an income of RM5,250 *per mensem*. And also, the petitioner together with the child of the marriage has been in sole occupation of the said property since late 1977, and the child of the marriage is no longer a minor, having reached the age of majority in December 1994.

When dealing with an application under s. 76 of the Act it is essential for this Court to make a finding of fact on the question of whether the said property was acquired by the petitioner and the respondent during the marriage by their joint efforts, and if so, to apply s. 76(1) and (2); or the said property was acquired by the respondent during the marriage by his sole effort, and if so, to apply s. 76(3) and (4) of the Act.

At the hearing before me, the petitioner maintained that she had made certain mortgage instalment payments in cash on the said property covered by the ten receipts shown as Exhibits "AB 440" to "AB 450" (item 10 in petitioner's bundle of documents) which were in her custody. She said that as she did not operate a current account in any bank, the mortgage instalments were paid by cheques drawn against the respondent's account, and though the receipts

were in his name, they were in her custody because she had repaid him on those payments. She said that she had reimbursed the respondent on the said instalments in cash within a few weeks of each payment. This was denied by the respondent who testified that all the said ten installments were paid by him from his own funds and resources.

After carefully considering the oral evidence of both parties, the affidavits and the various exhibits in the two bundles of documents, I accept and find that it was the respondent who paid the instalments on the property from his own funds and there had never been any reimbursement by the petitioner to the respondent in respect any of the said 10 instalments. I find no reason to accept the petitioner's testimony in this respect as she herself had admitted in Court that she had never refunded the respondent in cash on every occasion that he paid the instalments but only that she gave him cash whenever he needed it. Her evidence on this was vague and uncertain and in response to a query from the Court, she admitted that the alleged financial assistance to the respondent was not related specifically to any of the mortgage instalments. It would appear to me that the main reason for the petitioner's claim concerning the said ten (10) instalments is because she had the original receipts in her possession. It is not uncommon for husbands to allow their wives to keep documents and receipts, and the respondent's story that he had left it there when he moved out of the matrimonial home in a hurry is thus highly probable. Considering the dearth of evidence on any tangible contribution by her towards the acquisition of the said property, and her admission that save for the said ten instalments, the quit rents and the said redemption sum paid by her, she had made no other financial contribution on the purchase of the house, I cannot but find that the said property was acquired during the marriage not by the joint efforts of the parties but by the sole effort of the respondent.

Thus, the issue of the division of assets here would have to be determined within the purview of s. 76(3), and the exercise of the Court's powers thereunder, subject to the provision and in terms as stipulated in s. 76(4) of the Act.

The further issue concerns the half (1/2) undivided share of the said property currently registered under her name. The petitioner had in her evidence contended that the respondent gave her a half (1/2) share of the property as a wedding gift when they married on 29 April 1975, and hence instructed Peninsula Finance Berhad to include her name in the property; as a result, both of them became joint owners. During examination in Court, the respondent denied that the 1/2 share of the matrimonial home was intended to be a wedding gift. He said that petitioner's name was only added in as a cost saving measure so as to obtain a Government loan at 4% interest rate but the petitioner changed her mind later on and did not take up the Government loan. And, that he had never addressed his mind to the implications of the property

being registered in both names, although in his own words he agreed that, in the document of title, "if it was 1/2 share each it was O.K. by me." There is no reason for the Court to reject the respondent's explanation.

Be that as it may, I hold that the contention of the petitioner that the half (1/2) share of the matrimonial home was intended as a wedding gift is misconceived and without merit given that it was not pleaded in the petition (encl. 1) and was only raised for the first time in the petitioner's affidavit (encl. 34, p. 3, para. 7) in support of her summons in chambers (encl. 32) to set aside an earlier consent judgment in respect of the said property. The contention of the Counsel for the petitioner that the Form as prescribed for the petition under the rules does not provide for other matters to be raised, cannot be right as rr. 8 and 56 of the Divorce and Matrimonial Proceedings Rules 1980 (the rules) and Forms 2 and 11 therein are quite sufficient to enable the petitioner to raise any issue relevant to the division of matrimonial assets under s. 76. Rule 8 states that a petition "shall contain the information required by Form 2" and para. 13 of Form 2 requires the petitioner "to set out the ground on which the relief is sought, and **in any case state with sufficient particularity the facts relied on** ...". It is axiomatic that, if the Court is required, in the exercise of its powers under s. 76(1) and (2), to have regard to considerations under s. 76(2) and (4), "the facts relied on" has to be provided "with sufficient particularity" in Form 2, as the opposite party is entitled to know the precise nature of the pleaded case that he or she would have to meet.

In any event, even if this Court accepts the petitioner's assertion that the half (1/2) share of the matrimonial home registered in her name was intended as a wedding gift, it nevertheless cannot displace the discretion of the Court, be it under s. 76(2) or 76(4) of the Act, having regard to the following:

i) that s. 76(1) and s. 76(3) conferring the power to order a division of any assets speak only of assets acquired during the marriage either by the joint efforts of the parties or by the sole effort of one party, the question of the parties' pre-determined positions either by way of registration or any spousal agreement is irrelevant;

ii) that the title to the matrimonial home in the joint names of the parties or otherwise and whether presumptive of advancement or otherwise is irrelevant for purposes of s. 76 and cannot preclude the Court from exercising its discretion under s. 76, (see also *Matrimonial Law in Singapore and Malaysia* by Tan Cheng Han, Butterworths.)

iii) the ratio in the judgment of the Singapore Court of Appeal in *Wee Ah Lian v. Teo Siak Weng* [1992] 1 SLR 688 (which I shall adopt) where the Court held that:

> it is incumbent on the Court to see that the provisions of the section are not violated when ordering a division of matrimonial assets following the granting of a decree of divorce, and the same would apply where the Court's intervention is sought notwithstanding that the parties may have reached an agreement before seeking the Court's intervention;

(iv) the concluding remarks of Lord Hailsham LC in *Hyman v. Hyman* [1929] AC 601:

> ... the power of the Court to make provision for a wife on the dissolution of her marriage is a necessary incident of the power to decree such a dissolution, conferred not merely in the interests of the wife, but of the public, and that the wife cannot by her own covenant preclude herself from invoking the jurisdiction of the Court or preclude the Court from the exercise of that jurisdiction". In my view, this approach should be adopted with equal force also in cases where the husband has covenanted.

Consequently, it is just and essential that the Court requires an applicant who comes before the Court to seek a division of matrimonial assets under s. 76 of the Act, to submit for the Court's adjudication, the whole of the property or properties acquired during the marriage.

Section 76(4) specifically directs the Court:

> ...; but **in any case** the party by whose efforts the assets were acquired shall receive a greater proportion.

Thus, if the finding is that the said property (as I have so found) was acquired through the sole efforts of the respondent it is mandatory that the Court shall give a greater proportion of the property to him.

As I have held, upon the facts in the instant case that the apportionment of property would have to be determined under s. 76(3) of the Act, it would appear that the Court may not have any discretion but to make the apportionment strictly in accordance with s. 76(4) of the Act, if the following case authorities are any indication, namely:

i) the judgment of the Singapore Court of Appeal in *Wee Ah Lian v. Teo Siak Weng* [1992] 1 SLR 688 where the Court held that it is incumbent on the Court to see that these provisions of the section are not violated when ordering a division of matrimonial assets;

ii) the judgment of the High Court in *Re Heng Peng Hoo* [1989] 3 MLJ 103 where Mohamed Dzaiddin J (as he then was) considered s. 76(3) & (4) to the exclusion of s. 76(1) & (2) once it was established that the matrimonial property was not jointly acquired but was acquired by the sole effort of one party;

Note:

In that case, the acknowledgment by the respondent husband that the petitioner wife had brought up and looked after their four (4) children of the marriage and had contributed to the welfare of their family was not sufficient to entitle the petitioner wife to a claim under s. 76(1) of the Act.

iii) the judgment of the High Court in *Lee Yu Lan v. Lim Thain Chye* [1984] 1 MLJ 56 where Peh Swee Chin J (as he then was) in allowing the petitioner wife one-third (1/3rd) share of the proceeds of sale under s. 76(4), had nevertheless refused to entertain her claim for an additional sum out of the proceeds of sale to be put in a trust fund for the benefit of the minor children.

Accordingly, it would follow that the petitioner's entitlement to share of the matrimonial home or the proceeds or sale under s. 76(3) and (4) cannot in law be equal or greater in proportion to the respondent's entitlement considering the following:

i) that the contention that a half (1/2) share of the matrimonial home already registered in the name of the petitioner whether as a wedding gift, or otherwise (even if true) is irrelevant for the purposes of division of the matrimonial asset;

ii) that the matrimonial home was acquired during the marriage by the sole effort of the respondent in making the initial down payment and the monthly mortgage instalments from January 1975 to June 1983;

iii) that the marriage which took place on 29 April 1975 lasted barely three (3) years and that accordingly, the contributions of the petitioner to the welfare of the family - essentially a one (1) child family - cannot displace the greater proportion to be accorded 'the party by whose effort the assets were acquired'. See *Koh Kim Lan Angela v. Choong Kian Haw* [1994] 1 SLR 22; *Re Heng Peng Hoo & Anor*. [1989] 3 MLJ 103;

iv) that there are no needs of minor children to consider as the only child of the marriage has reached the age of majority in December 1994.

v) that the petitioner's entitlement if at all, is only to credit for the whole or a portion (to be determined) of the sum of RM47,094.06 paid by her towards redemption of the matrimonial home in August 1990, since the payment was made only after the order for judicial separation dated 26 February 1979 and the divorce *decree nisi* dated 21 June 1990;

Note:

In cases where one party had continued to pay the mortgage instalments after the separation, credit for half (1/2) of the payment of the mortgage was provided for, if only because both parties had contributed to the purchase of the matrimonial home. See *Leake v. Bruzzi* [1974] 1 WLR 1528; *Cracknell v. Cracknell* [1971] P 356.

The only factors which the Court has to consider under s. 76(4) of the Act, is "the extent of contribution made by the party who did not acquire the assets to the welfare of the family by looking after the home or caring the family ...". Thus, the following factors, submitted by the petitioner's Counsel, *viz.*: the financial standing of the petitioner; the petitioner has no other assets; the respondent's earning potential is greater than the petitioner; the petitioner has reached a maximum in the salary scale known as category DG 6 and approaching the age of retirement; the petitioner is currently providing for the son's needs when the son is no longer a minor; and the petitioner has not sought substantial maintenance for herself; are totally irrelevant and outside the ambit of factors for consideration under s. 76(4) of the Act. These factors are exhaustive and the Court cannot take other factors into consideration.

Thus, strictly in accordance with the requirements under s. 76(4) it would follow that the respondent should receive a greater proportion of the share or proceeds of sale, and upon the facts of the current case I would hold that the petitioner's share of the proceeds be limited to no more than one-third (1/3) undivided share of the said property or of the proceeds of sale of the matrimonial home; a proportion which should cover adequately the petitioner's contribution generally, as a gainfully employed wife and mother, to the welfare of the family. As the aforementioned factors submitted by Counsel are extraneous factors which ought not to be considered, an one-third (1/3rd) share of the proceeds of sale of the matrimonial home would be a very fair and equitable apportionment, considering that a sum of only RM10,000 was awarded to the petitioner wife in *Re Heng Peng Hoo* [1989] 3 MLJ 103.

Furthermore, the Court cannot give any greater weight or significance to the contributions of the petitioner considering the following:

i) that the respondent's financial contributions to the matrimonial home in the region of some RM76,000 do exceed the payments made by the petitioner and that in any event the respondent is not making a claim for a share of the moveable assets therein;

ii) that the quit rent and assessments paid by the petitioner since 1980 and the payment towards redemption of the matrimonial home after the order for judicial separation dated 26 February 1979 was made solely for the benefit and convenience of the petitioner;

iii) that the petitioner has had the use of the matrimonial home for the past eighteen (18) years although the marriage lasted barely three years;

iv) that had it not been for the respondent's sole effort in purchasing the matrimonial home and maintaining the mortgage instalments from January 1975 to June 1983 there would have been no matrimonial home to save from auction sale.

v) that in any event the contributions by the respondent do in fact exceed the contributions *post facto* by the petitioner, in monetary terms as well as in real terms by reason of the purchasing power of the contributions made by the respondent between January 1975 to June 1983.

The argument on the part of Counsel for the petitioner to seek a greater proportion on the basis of the respondent's conduct, namely his adultery and 'abandonment of matrimonial home and flagrant disregard for the welfare and interest of estranged spouse and child' is untenable in law for the following reasons:

i) that the power of the Court to order division of matrimonial assets under s. 76 is subject and subject only to those considerations prescribed therein and that conduct of the parties is and has always been irrelevant;

ii) that even the power of the Court to award damages for adultery against a co-respondent under s. 58 of the Act, is qualified in that the 'the award shall not include any exemplary or punitive element'.

iii) that following the order for judicial separation dated 26 February 1979, it shall no longer be obligatory for the petitioner to cohabit with the respondent and accordingly, the respondent was not legally obliged to continue with the mortgage payments although such payments were made until June 1983. See s. 64(2) Law Reform (Marriage and Divorce) Act 1976.

Although the respondent is entitled to a greater proportion of the proceeds of sale under s. 76(4) the respondent in his evidence has volunteered that he is nonetheless prepared to accept an equality of division. Notwithstanding the decision of this Court to favour the respondent with a greater proportion of the said property even though, in the title, same is registered in the joint names of the petitioner and the respondent in equal shares, the Court may still, in the interests of justice, exercise its discretion within the framework of s. 76(3) and (4) to confirm such registered *status quo*, in view of the respondent's concession herein. See *Matrimonial Law in Singapore and Malaysia* by Tan Cheng Han.

This leaves me, finally, in determining the mode of execution of the order which I shall now make, to consider whether the Court shall have regard only to the market value or price obtainable from the sale of the matrimonial home

that is current at the date of the order for division as and when made. It cannot be justified in the circumstances of the case or by current judicial practice to adopt the value as at the date of the divorce *decree nisi* or as at the date of redemption of the matrimonial home as contended by Counsel for the petitioner. It is clearly provided in s. 76 that this Court may order **division or the sale** of matrimonial assets. Thus, a difficult question arises where the dispute between the husband and wife concerned a particular and singular property and the Court holds that both are entitled to a share of same. In such an event, as the Court would have no alternative but to order the sale of the property to a third party or by one party to the other, it can neither be sensible nor practical for the Court to order that the property be sold at a price other than the current market price.

In any event, this issue was not seriously canvassed by Counsel for the petitioner in his submission. Be that as it may, and considering with regret that this prayer for division of matrimonial assets had (on 4 September 1995) come up for hearing in this Court only recently - that is over 16 years after the order for judicial separation and 5 years after the divorce *decree nisi* had been made absolute - while it is incumbent upon the petitioner, in her interests, to pursue her claim with vigour and to have this matter tried early.

I have held that the apportionment of the said property in favour of the petitioner *vis-a-viz* the respondent ought to be in the proportion of one third (1/3) and two third (2/3), whereas the respondent has acknowledged that he is prepared to accept equality of division of the said property, provided that no account is taken of the amount expended by the petitioner on the redemption of the said property. Nonetheless, it is this Court's view that since the petitioner had saved the property from the "auctioner's hammer" when the then minor child of the marriage was staying with her, (though having acted partly in her own interests), it is only fair and equitable to order that the petitioner shall be entitled to a refund or credit of half of the amount of RM47,094.06 expended by her in August 1990 on the redemption thereof.

I hereby order that the said property be divided between the petitioner and the respondent equally and that it be sold within 3 months from date hereof at the current market value, to be determined by a reputable licensed valuer appointed by the Senior Assistant Registrar of the Court. And that both parties hereto shall be at liberty to buy the other out of the half share of the said property; provided that if same shall be sold to third parties, the petitioner and respondents shall each partake in 1/2 share of the proceeds of its sale, after deduction of expenses to be incurred on the sale. It is also ordered that the petitioner shall be compensated to the extent of half (1/2) of RM47,094.06 expended by her in August 1990 on the redemption of same. I would further order that in the event either party hereto refuses or fails to execute the

transfer of the said property to the successful purchase or to the opposite party (who has purchased) within 14 days of the conclusion of the sale, the Senior Assistant Registrar of the Court shall be authorized to duly execute the relevant transfer.

I lastly order that each party shall bear his or her own costs of the current proceeding.

Reported by L Nagarajah